

# Exhibit 32

## ROUGH DRAFT TRANSCRIPT

## VIDEOCONFERENCE DEPOSITION OF ELI AUERBACH

MAY 7, 2020

A realtime rough draft is unedited and uncertified and may contain untranslated stenographic symbols, incorrectly translated words, misspelled proper names, nonsensical word combinations and an occasional reporter's note. Any inaccuracies will be corrected in the final certified transcript of proceedings.

By acceptance of a rough draft of proceedings, any party or counsel representing any party to the action understands and agrees that the text of a rough draft may not be quoted or cited in any subsequent court or discovery proceeding, may not be used for impeachment purposes and may not be distributed in any form to any other person or entity.

Further, by acceptance of a rough draft of proceedings, any party or counsel representing any party to the action agrees to indemnify and hold harmless the individual court reporter should the final transcript differ in form or content from the rough draft of the proceedings.

- - -

2 MS. SIEGMUND: This is Heidi Siegmund  
3 with McGuire Woods, representing the  
4 plaintiff, Chmura.

5 I'm just noting for the record that all  
6 counsel have stipulated that it's fine that  
7 we're doing this remotely, and that the court  
8 reporter and the witness are not in the same  
9 room, and that no one objects to that  
10 arrangement.

11 MR. POSEY: This is Terry Posey for  
12 Mr. Auerbach, we consent the that arrangement.

13 MS. COOPER: Counsel for Mr. Lombardo,  
14 Christine Cooper and we consent, as well.

15 E L I A U E R B A C H,

16 called as a witness, having been first  
17 duly sworn by a Notary Public, was  
18 examined and testified as follows:

19 EXAMINATION BY

20 BY MS. SIEGMUND:

21 Q. Mr. Auerbach, I won't go over the rules  
22 again, but, of course, this is all the same as  
23 what we were going through on Tuesday, as far as  
24 you being under oath and we'll try not to talk  
25 over each other and so forth.

2 I just have a very little bit more to go  
3 over with you.

4 I think when we left off on Tuesday we  
5 were going through your affidavit that you had  
6 executed before leaving Chmura, and making sure  
7 that we got on the record anything that you no  
8 longer think is totally accurate.

9 So I'm going to submit that same exhibit  
10 that we used the other day.

11 (Exhibit A previously marked for  
12 identification was offered.)

13 Q. Mr. Auerbach, hopefully these come  
14 through a little bit more quickly today, so just  
15 let me know when that affidavit comes up for you.

16 I think we had gone through the first  
17 page on the record the other day, so I am going to  
18 go ahead and skip to Page 2.

19 A. The computer is still loading.

20 Q. Mr. Auerbach has that affidavit come  
21 through?

22 A. No, it just shows me, on the right side  
23 it says exhibit loading. Please wait. There's  
24 been no change.

25 Q. Are you able to go to the exhibit files

2 and see the submitted exhibit?

3 A. I tried a few times now to do that. I  
4 can see that it's there, but when I go to look at  
5 the preview it says error.

6 Q. Okay. I did ask the LiveLitigation  
7 folks about this, and they said it's just a  
8 function of the internet connection. So sorry for  
9 the delay, but just let me know when it comes  
10 through.

11 I just submitted it again, and I'll also  
12 go ahead and e-mail this to you and Mr. Posey.

13 And I think we all know what we're  
14 looking at and maybe that will be faster.

15 This is the only exhibit I'm going to  
16 use today, so, hopefully, we won't take up too  
17 much time with this.

18 I'm going to go ahead and send this by  
19 e-mail. This won't be the stamped version that's  
20 in LiveLitigation, but just so we can move this  
21 along.

22 MR. POSEY: I'll be happy to review it  
23 and stipulate that it's the same, once I see  
24 your e-mail.

25 MS. SIEGMUND: All right. You should

2 all be getting that exhibit by e-mail here in  
3 a second.

4 BY MS. SIEGMUND:

5 Q. Mr. Auerbach, let me know when you get  
6 that e-mail, that might be faster.

7 A. Sorry, I was on mute. It has arrived.

8 Q. Excellent.

9 MR. POSEY: I would stipulate that the  
10 document that you e-mailed to Chmura 0000184  
11 through 187, which I believe is the same as  
12 the submitted Exhibit A.

13 Q. Super. Mr. Auerbach, do you have that  
14 e-mail, Exhibit A in front of you?

15 A. I do, yes.

16 Q. Okay. So let's look at Page 2. Take a  
17 look at Page 2 for me, please, and let me know if  
18 you see anything on Page 2 that you now believe is  
19 false.

20 A. It looks correct to me.

21 Q. Super. Let's go to Page 3, take a look  
22 at Page 3 and tell me if there's anything you see  
23 on here that is false.

24 And that's Chmura -- the number at the  
25 bottom is Chmura 0000186?

2 A. This looks correct.

3 Q. Super.

4 Let's go to Page 4, that's the last  
5 page, it has your signature on it.

6 Let me know if you see anything on  
7 Page 4 that you now believe is false.

8 A. That is correct.

9 MS. SIEGMUND: Super. That is all I  
10 have for you. Thank you, Mr. Auerbach.

11 I think Ms. Cooper will have some  
12 questions for you.

13 MS. COOPER: Thank you.

14 EXAMINATION

15 BY MS. COOPER:

16 Q. Good morning, Mr. Auerbach, how are you?

17 A. Good morning. Well, thank you.

18 Q. Good. I want to ask you a few  
19 background questions before I jump into a couple  
20 of specifics and go down that path.

21 You were a sales manager at Chmura,  
22 right?

23 A. That is correct.

24 Q. Did you have any prior management  
25 experience?

2 A. I had, yes.

3 Q. And can you tell me a little about your  
4 management experience prior to joining Chmura?

5 A. It was probably three specific positions  
6 I think align closely to what I did at Chmura.

7 Probably mid 20's, about 15 years ago, I  
8 was a sales manager for a steel company in  
9 Cleveland. I was there for a few years.

10 And then there was a position I held  
11 over at the Council of Small Enterprises.

12 (Discussion held off the record.)

13 THE WITNESS: The next position I think  
14 that most closely aligns was a position with  
15 COSE, the Counsel of Smaller Enterprises.  
16 They were a large regional Chamber of  
17 Commerce. And I was there for three years and  
18 was a manager in their energy program.

19 And then, after leaving there, I worked  
20 for a company called Echo. They were an  
21 energy retrofit company, worked with mid- to  
22 medium-sized businesses and I was in  
23 management there as well.

24 Q. And approximately how many years of  
25 management experience do you have?



2 A. I'd say from my first experience until  
3 now, about 15 years.

4 Q. I want to turn your attention to your  
5 work at Chmura.

6 What were your job responsibilities?

7 A. So primarily I was responsible for  
8 working with the sales team to cultivate new sales  
9 opportunities, new business; to get a high rate of  
10 renewal for our existing client base; and also  
11 work with account managers to most efficiently and  
12 effectively cultivate these opportunities through  
13 e-mail campaigns or calling or developing call  
14 lists for them to work from.

15 And then, preparing a number of  
16 different reports, sometimes weekly, sometimes  
17 monthly, to share with leadership to keep them  
18 apprized of our progress.

19 Q. Were you, during the time of your  
20 employment, Mr. Lombardo's direct supervisor?

21 A. I was, yes.

22 Q. And do you know what his job title was  
23 at the time you were his supervisor?

24 A. Senior account manager.

25 Q. There's the account manager position and

2 the senior account manager position, correct?

3 A. That is correct, yes.

4 Q. What's your understanding of the  
5 difference between the two?

6 A. To be very honest, I don't see there  
7 being a difference between the two.

8 My understanding was the increase in  
9 that title was developed as a means to appease the  
10 older account managers that were there, so that  
11 they can be distinguished between newer account  
12 managers coming in.

13 Q. Mr. Lombardo would have been one of  
14 those older account managers, right?

15 A. That is correct, yes.

16 Q. I want to talk about your observations  
17 and your own personal knowledge of the hours  
18 Mr. Lombardo worked.

19 First -- and we went through some of  
20 this last week. I just want to drill down a  
21 little bit.

22 Did you spend most workdays in the  
23 office?

24 A. I did, yes.

25 Q. And did you -- you didn't -- I'm sorry.

2 let me rephrase that.

3 You didn't travel as a substantial part  
4 of your job responsibilities, did you?

5 A. No, it wasn't a substantial part.

6 Q. In your experience, did Mr. Lombardo  
7 spend most of his workdays in the office?

8 A. That is correct, yes.

9 Q. Was Mr. Lombardo required to travel  
10 substantially for work?

11 MS. SIEGMUND: Object to the form of the  
12 question.

13 You can answer.

14 THE WITNESS: I think it was a regular  
15 component, but I would not say substantial.

16 Q. Can you put a number on that for me? In  
17 any given month, how frequently would Mr. Lombardo  
18 travel?

19 A. I think is fair representation would be  
20 one trip a month for about three days each time.

21 Q. And were those to -- where was he  
22 traveling to?

23 A. The primary reason for traveling would  
24 be to attend different conferences or trade shows.

25 Q. Did you ever have to communicate with

2 Mr. Lombardo in the evenings, after leaving the  
3 office?

4 A. Yes, that was a pretty frequent  
5 occurrence.

6 Q. And approximately what time would you  
7 communicate with him?

8 A. If I had to put an average on it, it  
9 would usually be somewhere probably between 7 or  
10 8:00 at night.

11 Q. And when you would call him at 7 or 8:00  
12 at night, were you able to get ahold of him?

13 A. Every time, yes.

14 Q. Do you know how frequently those phone  
15 calls would occur?

16 A. I would say, just based on averages, it  
17 was probably weekly. There might be some weeks,  
18 not at all, other weeks we had to talk regularly.  
19 But, I would say probably average weekly.

20 I know that, when he would go to  
21 conferences, as with all of the account managers,  
22 we would touch base pretty often, just to get an  
23 understanding of how things were going while they  
24 were there.

25 Q. Would you ever have reason to call if

2 Mr. Lombardo wasn't at a conference?

3 A. Absolutely, yes.

4 Q. What was your understanding of  
5 Mr. Lombardo's employment responsibilities while  
6 as a senior account manager?

7 A. The significant majority of his time  
8 went toward pursuing new business opportunities,  
9 and working very closely with his existing client  
10 base, just to make sure the platform was working  
11 for them the way that they wanted. As well as  
12 answering any questions they may have regarding  
13 how to maximize the platform and their use of it.

14 Q. Was Mr. Lombardo ever responsible for  
15 supervising other employees?

16 A. No.

17 Q. Was he responsible for making decisions  
18 about company strategy?

19 A. No.

20 MS. SIEGMUND: Object to the form of the  
21 question.

22 You can answer.

23 THE WITNESS: No, he was not.

24 Q. Was he responsible for setting spending  
25 priorities?

2 A. No.

3 Q. Was he responsible for establishing  
4 policies or procedures for the company?

5 MS. SIEGMUND: Object to the form of the  
6 question.

7 You may answer.

8 THE WITNESS: No.

9 Q. Was he responsible for any form of  
10 compliance?

11 A. Can you define "compliance," please?

12 Q. Sure. Was he -- fair question.

13 Was he responsible for any legal  
14 compliance activities at Chmura?

15 A. The one singular thing that I think  
16 might qualify is submitting to the client, and  
17 then providing to leadership the contract for the  
18 platform itself. But I think the best way to  
19 describe that was an intermediary between the two  
20 parties.

21 Q. Okay. Did Mr. Lombardo ever decide what  
22 conferences or trade shows he would attend?

23 A. No.

24 Q. Was Mr. Lombardo allowed to decide  
25 whether he would drive or fly to the conferences?

2           A.       I would say the best way to explain that  
3       is he was permitted to give input, and sometimes  
4       leadership would agree with it, other times not.

5           Q.       Who decided which conferences and trade  
6       shows Mr. Lombardo would attend?

7           A.       I would say leadership was largely  
8       responsible.

9           Q.       Who made decisions on -- let me go back  
10      for a second.

11                   Who made the ultimate decision on how  
12      Mr. Lombardo would travel?

13          A.       I would say that was leadership.

14          Q.       Did Mr. Lombardo ever visit clients on  
15      site?

16          A.       Not to my knowledge, no.

17          Q.       Can you describe what it was like  
18      managing Mr. Lombardo?

19          A.       I would say overall it was a very good  
20      experience. I think we had some growing to do  
21      together in the first weeks I was there, but I  
22      think afterwards, we had excellent communication  
23      with each other.

24                   Mr. Lombardo was always very helpful,  
25      not just to me when I was first coming on, but he

2 always took a vested interest in helping to guide  
3 and mentor some of the newer account managers that  
4 came on.

5 But, he was always someone I could count  
6 on to produce at a high level every month. He did  
7 just about everything I would ask him to do. He  
8 took suggestions very well. He was a very good  
9 quality account manager for the organization.

10 Q. Would you have described him as  
11 difficult to manage?

12 A. No.

13 Q. I'm going to show you what has been  
14 marked previously as -- bear with me while I pull  
15 it up here -- as Plaintiff's Exhibit I? I'll try  
16 to submit it through this. I have not done this  
17 before and perhaps I should e-mail it to everybody  
18 as well, since we're having some difficulty. Let  
19 me see if I can.

20 That did not work. Okay.

21 Did I lose -- I think I lost everybody.

22 If you can hear me, you can't see me?

23 MS. COOPER: If we could go off the  
24 record one minute while I hook myself back up.

25 (Recess taken from 10:24 a.m. to



2 10:27 a.m.)

3 (Exhibit I Plaintiff's previously  
4 marked for identification was  
5 offered.)

6 BY MS. COOPER:

7 Q. Mr. Auerbach, I believe you were shown  
8 this document the last -- the other day. It's  
9 marked as Plaintiff's Exhibit I.

10 Can you identify this document?

11 A. Yes, this was a phone conversation I was  
12 asked to document by leadership at Chmura.

13 Q. And did you prepare this document?

14 A. I did, yes.

15 Q. And it pertains to a phone conversation  
16 you had with Mr. Lombardo, correct?

17 A. That is correct.

18 Q. And when was the phone conversation?

19 A. I believe it is correctly stated as  
20 October 21st.

21 Q. Do you recall when you prepared the  
22 notes?

23 A. I do not recall the exact date.

24 If I had to venture a guess, I would  
25 probably say within a week of this conversation

2 happening.

3 Q. Did you prepare these notes in the  
4 ordinary course of your responsibilities at  
5 Chmura?

6 A. I certainly interpret it that way.

7 Q. And did you maintain this document with  
8 the other business documents you maintained for  
9 Chmura?

10 A. No, I did not.

11 Q. How did you keep this document -- let me  
12 ask, did you keep this document?

13 A. I believe I did, and I believe there was  
14 a separate folder I created specific to everything  
15 related to the separation of Mr. Lombardo from  
16 Chmura.

17 Q. Did you provide this document to others  
18 at Chmura?

19 A. I only gave it to leadership.

20 Q. To your knowledge, was this document  
21 relied upon at Chmura, at least in part, to make  
22 business decisions with respect to Mr. Lombardo's  
23 employment status?

24 A. I do not know. I'm not sure what  
25 leadership -- how they interpreted this

2 conversation.

3 Q. To your knowledge, when you spoke to  
4 Mr. Lombardo on October 21st, 2019, had he already  
5 received a cease and desist letter from Chmura's  
6 attorneys?

7 A. Yes, I believe that was what the impetus  
8 of the conversation was.

9 Q. I want to look at the last full  
10 paragraph above where it says "\*that was the end  
11 of our call." If you could just take a quick read  
12 through that paragraph.

13 A. Okay.

14 Q. And it says that -- I'll put the quote  
15 in there, "I reminded Rick that we would need to  
16 make a hand-off to provide him his personal  
17 effects from the Cleveland office, in exchange for  
18 the items that belonged to Chmura, such as the  
19 conference materials, laptop and conference  
20 notes."

21 Do you see that?

22 A. I do, yes.

23 Q. Do you recall the specifics of that part  
24 of the conversation, exactly what was said?

25 A. I remember in a very general sense.

2 But, I know that because Rick was asked to leave  
3 very abruptly, none of his personal effects at his  
4 desk did he take with him.

5 After he was officially fired, I was  
6 told to pack up his desk and set it aside.

7 And then, the leadership team said that  
8 Rick would be able to get his personal effects  
9 when he signed off on their termination agreement  
10 and settlement amount, as well as him returning  
11 the -- any materials that belonged to Chmura.

12 Q. To your knowledge did Mr. Lombardo ever  
13 receive his personal effects back?

14 A. No, not that I know of.

15 Q. And it is stated, the -- the \*then  
16 sentence in that paragraph says, I reminded him  
17 that none of that could be discussed until he had  
18 finished reviewing the legal documentation and  
19 signed off on the agreement."

20 Do you said that?

21 A. Yes.

22 Q. What did you mean by that?

23 A. It was my understanding that the  
24 leadership team wasn't going to make the exchange  
25 of his personal effects, first and foremost

2 because Rick still had property that they felt  
3 belonged to Chmura.

4 But, in addition, leadership concluded  
5 that if he were to sign off on the agreement and  
6 return the belongings, they would also immediately  
7 return his personal effects.

8 Q. Did you instruct him during that call to  
9 return the laptop or the conference notes or the  
10 conference material?

11 A. I did not instruct him to do so. I  
12 simply reiterated for him what leadership was  
13 asking about.

14 Q. Was it your understanding that it would  
15 be a mutual exchange, he would get his personal  
16 effects back and the laptop would be exchanged at  
17 the same time?

18 A. That would have been my understanding,  
19 yes.

20 Q. Do you recall -- changing topics a  
21 little bit here.

22 Do you recall a conversation you had  
23 with Mr. Lombardo regarding him notifying you that  
24 he was entitled to any overtime compensation?

25 A. Yeah. This was a question I was asked a

2 couple days ago, that I did not recall.

3 But I remember, after thinking it  
4 over -- I don't remember exactly when, I believe  
5 it was definitely before the Indianapolis trip.  
6 Well, it had to have been prior to the trip to  
7 Indianapolis. But I remember him saying something  
8 in passing about having been owed overtime.

9 Q. When was the Indianapolis trip?

10 A. I think roughly it was the second week  
11 of October.

12 Q. Okay. Do you recall any specifics about  
13 the conversation?

14 A. It was something -- I recall the concept  
15 of what he was presenting, but it was something  
16 that I didn't clearly understand, it didn't  
17 resonate with me, so I really quickly forgot it.

18 He -- the extent of the content of what  
19 I remember was just that he felt there was a  
20 substantial amount of overtime he had worked, that  
21 he was never compensated for.

22 Q. Did you tell anybody about that  
23 conversation at Chmura?

24 A. I did not, no.

25 Q. And why not?

2 A. It was not at the time something that I  
3 thought was a consequential statement that he had  
4 made.

5 Q. Okay. Did you -- I think you stated  
6 this the other day in your testimony -- did you  
7 look at the information coming out of Salesforce?

8 A. While I was at Chmura?

9 Q. Yes.

10 A. Yes, on a very regular basis. It was  
11 one of the primary components of my job.

12 Q. And did it track the account manager's  
13 and senior account manager's activities?

14 A. In detail, yes.

15 Q. And of the sales -- I'm sorry -- of the  
16 account managers and senior account managers who  
17 were there at the time of your employment, did  
18 Mr. Lombardo have the highest level of activity?

19 A. Yes, he consistently out performed all  
20 other members of the sales team.

21 Q. Do you know how -- if you could but a  
22 number on it, say calls, for example, how many  
23 more calls was Mr. Lombardo making on average,  
24 than the other account managers or senior account  
25 managers?

2 A. I think if we're talking about the  
3 number of phone calls, it would be easy a 2 to 1  
4 margin in favor of Mr. Lombardo.

5 Q. What about any e-mails sent?

6 A. I would say e-mails, because  
7 Mr. Lombardo, the majority of his time were phone  
8 calls, I would say he was either even with or  
9 maybe slightly behind some of the other account  
10 managers.

11 Q. Okay. With respect to -- I want to turn  
12 to just a few last questions. I just want to turn  
13 back to the laptop for a moment and Mr. Lombardo's  
14 departure.

15 Who instructed him to leave the office?  
16 I believe it was -- well, let me ask this: Was  
17 Mr. Lombardo's last day present in the office  
18 October 17th of 2019?

19 A. I believe that's correct.

20 Q. And were you present there that day?

21 A. I was, yes.

22 Q. Who instructed Mr. Lombardo to leave?

23 A. I received a phone call from Chris  
24 Chmura who instructed me to have Mr. Lombardo  
25 leave immediately.



2 Q. Did Mr. Lombardo take a laptop with him  
3 that day?

4 A. To the best of my recollection, I  
5 believe the laptop was in his car, which it might  
6 have very well been at home, I don't recall. But  
7 I believe, to my recollection, he left with  
8 nothing in his hands.

9 Q. Did you instruct him to bring the laptop  
10 back that day?

11 A. I did not, no.

12 Q. Were you at all concerned about the  
13 laptop that day?

14 A. In truth, I do not recall if that was a  
15 concern being discussed.

16 I know that at the time I asked him to  
17 leave, I wasn't aware that there was a laptop in  
18 his possession.

19 Q. Did leadership, prior to instructing you  
20 to have him leave for the day, did they tell you  
21 to get back any possessions of Chmura's from  
22 Mr. Lombardo?

23 A. I don't have a recollection of them  
24 asking me to do that.

25 Q. Okay.

2 MS. COOPER: Those are all of the  
3 questions that I have. Thank you,  
4 Mr. Auerbach.

5 MS. SIEGMUND: Do you mind if we take a  
6 quick break? I don't think I have anything  
7 further, but I just want to make sure I have  
8 all of my notes in order.

9 MR. POSEY: Sure thing.

10 MS. SIEGMUND: Let's take five minutes.

11 (Recess taken from 10:39 a.m. to  
12 10:44 a.m.)

13 BY MS. SIEGMUND:

14 Q. This is very quick, couple of additional  
15 questions, Mr. Auerbach.

16 I know when we spoke on Tuesday you did  
17 not recall Mr. Lombardo ever mentioning anything  
18 about overtime, but you thought it over since  
19 Tuesday and now you do recall him saying something  
20 about overtime.

21 Was there anything in particular that  
22 prompted you to remember that conversation?

23 A. No. I was just reviewing the questions  
24 I had been asked, and it was, I would say, a  
25 fleeting recollection from all of the different

2 conversations I had had over the last five or six  
3 weeks that Mr. Lombardo was at Chmura.

4 Q. Did you review any documents that helped  
5 you remember that conversation?

6 A. I did not.

7 Q. Did you review the statement that you  
8 had provided to Ms. Cooper?

9 A. I did not.

10 Q. But, there was not nothing in the  
11 affidavit that you provided to Chmura about this  
12 conversation, correct?

13 A. That is correct.

14 Q. And you provided that affidavit to  
15 Chmura a few weeks after Mr. Lombardo is  
16 terminated, correct?

17 A. Yes, that is correct.

18 Q. And you provided the affidavit to  
19 Ms. Cooper after you were fired from Chmura,  
20 correct?

21 A. That is correct.

22 MS. SIEGMUND: That's all I have. Thank  
23 you.

24 MR. POSEY: We will read, just to make  
25 sure the exhibits are properly included.

2 COURT REPORTER: I have McGuire Woods  
3 has a standing order. Do you still want your  
4 standing order.

5 MS. SIEGMUND: I don't know about a  
6 standing order, but we would like a rough  
7 draft.

8 COURT REPORTER: Yeah, that's in the  
9 standing order.

10 MS. SIEGMUND: That's good then.

11 COURT REPORTER: Ms. Cooper, do you want  
12 a copy of this transcript?

13 MS. COOPER: Yes, please.

14 COURT REPORTER: Do you know what format  
15 you want it in?

16 MS. COOPER: Just the mini script or the  
17 ordinary electronic transcript.

18 COURT REPORTER: Mr. Posey, do you want  
19 a copy this transcript?

20 MR. POSEY: No, thank you.

21

22

23

24

25